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Fraudulent Concealment of Anti-Semitism Held Ground for Annulment

RECENT DECISIONS

Fraudulent Concealment of Anti-Semitism Held Ground for Annulment

Plaintiff-wife brought an action for annulment on the grounds that defendant had falsely and fraudulently concealed from her the fact that he had been a Nazi army officer, that he believed in the extermination of the Jewish people, and that he would require her to cease socializing with all her Jewish friends. In reversing the appellate division's dismissal of the action, the Court of Appeals *held* that the triers of fact might find that the concealment went to the essence of the marital contract, thereby making the marriage "unworkable." *Kober v. Kober,* 16 N.Y.2d 191, 211 N.E.2d 817, 264 N.Y.S.2d 364 (1965).

As a general rule, any marriage procured by fraud is either void or voidable since it lacks the necessary element of mutual consent.[1] However, because of the special nature of the marriage contract and the public interest in fostering its permanence, it has often been held that the fraud involved must concern the *essentialia* of the marriage relationship, *i.e.,* cohabitation and consortium.[2] Under this theory, fraudulent misrepresentations as to accidental attributes and personality traits of the individual are normally not deemed to be of such an essential nature. Thus, fraud concerning birth, social position, fortune, good health or temperament is not sufficient to vitiate the marriage contract.[3]

New York applied the *essentialia* test[4] until 1903, when the Court of Appeals, in *di Lorenzo v. di Lorenzo,*[5] enunciated a more liberal rule which allowed the granting of an annulment for any fraud going to the essence of the contract.[6] In

[1] 3 NELSON, DIVORCE AND ANNULMENT § 31.29 (2d ed. 1945).

[2] Reynolds v. Reynolds, 85 Mass. 605 (1862); see also Vanneman, *Annulment of Marriages for Fraud,* 9 MINN. L. REV. 497, 500 (1925).

[3] See 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION §§ 452-528 (1891); 3 NELSON, *op. cit. supra* note 1, §§ 31.29-31.70; 1 SCHOULER, MARRIAGE, SEPARATION & DOMESTIC RELATIONS §§ 23-24 (6th ed. 1921).

[4] See, *e.g.,* Fisk v. Fisk, 6 App. Div. 432, 39 N.Y. Supp. 537 (1st Dep't 1896); Clarke v. Clarke, 11 Abb. Pr. 228 (N.Y. Sup. Ct. 1860).

[5] 174 N.Y. 467, 67 N.E. 63 (1903).

[6] See Crouch, *Annulment of Marriage for Fraud in New York,* 6 CORNELL L.Q. 401, 404-05 (1923); *Fraud in the New York Law of Annulment,* 9 BROOKLYN L. REV. 51, 55-58 (1940).

di Lorenzo, the defendant-wife falsely represented to plaintiff that he was the father of her child. Plaintiff contended that he was thereby induced to marry defendant, and that but for such representation, he would not have done so. The Court found that while public policy is concerned with the regulation of the marriage relation, the marriage contract has been regarded as any other civil contract, the essential elements of which are consent and the capacity to consent.[7] The absence of either element would make the marriage void or voidable. Any fraud, therefore, which is "material, to that degree that, had it not been practiced, the party deceived would not have consented to the marriage" would be sufficient basis for annulment.[8] Furthermore, the fraud must be of such a nature as would deceive a reasonably prudent person.[9] The ground on which the annulment is sought must not be capricious or fanciful,[10] but must relate to matters which go to the essence and substance of the contract.[11]

Thus, in *Shonfeld v. Shonfeld,*[12] an annulment was granted where the wife falsely represented that she had sufficient money to establish the husband in business after their marriage. Since the plaintiff had expressed the desire not to marry until he was able to support his wife, the misrepresentation of the wife as to her financial status was held to be a fraud affecting the essence of the marital contract. The Court added that the materiality of the fraud was to be determined on an *ad hoc* basis.[13] It was found that the defendant had misrepresented a material fact without which the marital relationship would not have been created.

In general, fraud supporting the annulment may be classified as *suggestio falsi,* an actual falsehood, or *suggestio veri,* the suppression or concealment of the truth.[14] The concealment or non-disclosure of certain facts[15] or intentions[16] will justify annulment when they go to the essence of the contract[17] and are of a character which, considering the relation of trust and confidence, ought to be disclosed.[18]

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[7] di Lorenzo v. di Lorenzo, 174 N.Y. 467, 472, 67 N.E. 63, 64 (1903); *accord,* Shonfeld v. Shonfeld, 260 N.Y. 477, 184 N.E. 60 (1933); O'Connell v. O'Connell, 201 App. Div. 338, 194 N.Y. Supp. 265 (1st Dep't 1922).

[8] di Lorenzo v. di Lorenzo, *supra* note 7, at 471, 67 N.E. at 64. *Accord,* Domschke v. Domschke, 138 App. Div. 454, 122 N.Y. Supp. 892 (2d Dep't 1910). "[I]f it be shown . . . that the same thing would have been done by the parties, in the same way, if the fraud had not been practiced, it cannot be deemed material." *Id.* at 458, 122 N.Y. Supp. at 895, citing 2 PARSONS, CONTRACTS 895 (8th ed. 1893).

[9] di Lorenzo v. di Lorenzo, *supra* note 7, at 474-75, 67 N.E. at 65; Shonfeld v. Shonfeld, *supra* note 7, at 481, 184 N.E. at 61; Levy v. Levy, 309 Mass. 230, 34 N.E.2d 650 (1941). See Crouch, *supra* note 6, at 407.

[10] Laarge v. Laarge, 176 Misc. 190, 193, 26 N.Y.S.2d 874, 877 (Sup. Ct. 1941).

[11] Smith v. Smith, 44 N.Y.S.2d 826, 827 (Sup. Ct. 1943); Rubman v. Rubman, 140 Misc. 658, 251 N.Y. Supp. 474 (Sup. Ct. 1931).

[12] Shonfeld v. Shonfeld, 260 N.Y. 477, 184 N.E. 60 (1933).

[13] *Ibid.*; see Crouch, *supra* note 6, at 407.

[14] *Op. cit. supra* note 1.

[15] Svenson v. Svenson, 178 N.Y. 54, 70 N.E. 120 (1904); Yucabezky v. Yucabezky, 111 N.Y.S.2d 441 (Sup. Ct. 1952); Costello v. Costello, 155 Misc. 28, 279 N.Y. Supp. 303 (Sup. Ct. 1934).

[16] Ryan v. Ryan, 156 Misc. 251, 281 N.Y. Supp. 709 (Sup. Ct. 1935).

[17] Roth v. Roth, 97 Misc. 136, 142, 161 N.Y. Supp. 99, 103 (Sup. Ct. 1916).

[18] Yucabezky v. Yucabezky, *supra* note 15; Eldredge v. Eldredge, 43 N.Y.S.2d 796, 797 (Sup. Ct. 1943).

Thus, fraud was found sufficiently material to void a marriage where a party represented himself as a person of good character and not addicted to drugs,[19] or where there was a concealment of conviction of a serious crime, such as rape[20] or other felony.[21] In addition, fraud concerning physical and mental incapacity,[22] prior marriage and divorce,[23] citizenship and ancestry,[24] as well as fraud to effect entrance into the country,[25] have been deemed sufficient to grant annulments.[26]

After fifty years of liberal interpretation of that which is material to the marriage contract, the Court of Appeals, in *Woronzoff-Daschkoff v. Woronzoff-Daschkoff*,[27] introduced the concept that the fraud must relate to something *vital* to the marriage relationship.

There, the Court refused an annulment based upon allegations that the defendant, an impoverished Russian nobleman, fraudulently stated to plaintiff, a wealthy Indian woman, that he had always earned his own living, and promised to find employment subsequent to their marriage. While not advocating a return to the *essentialia* concept, the Court concluded that annulments should not be granted "for any and every kind of fraud," but only for fraud as to matters deemed vital to the marriage relationship. It was held that the representations of the defendant, even though they might have deceived the plaintiff, were not vital to this particular marriage.[28]

The scope of the "vital" rule was not indicated, but in the implementation of this concept there has been no discernible change in the liberal attitude of the lower courts. Although annulments have been denied on the authority of *Woronzoff-Daschkoff*, the same results might well have been reached by application of the earlier rule enunciated in *di Lorenzo*. Annulments were refused under both tests for fraudulent representations of love and affection;[29] for concealment of mere bad habits;[30] for concealment of mother's mental incompetency;[31] and for concealment of premarital incontinence.[32] There

[19] O'Connell v. O'Connell, *supra* note 7.

[20] Giannotti v. Giannotti, 60 N.Y.S.2d 74 (Sup. Ct. 1946).

[21] Graves v. Graves, 27 Misc. 2d 436, 52 N.Y.S.2d 622 (Sup. Ct. 1945).

[22] Alter v. Alter, 250 App. Div. 428, 294 N.Y. Supp. 195 (2d Dep't 1937); Friedman v. Friedman, 187 Misc. 689, 64 N.Y.S.2d 660 (Sup. Ct. 1946).

[23] Costello v. Costello, *supra* note 15.

[24] Protopapas v. Protopapas, 47 N.Y.S.2d 460 (Sup. Ct.), *aff'd*, 267 App. Div. 804, 47 N.Y.S.2d 287 (1st Dep't 1943); Siecht v. Siecht, 41 N.Y.S.2d 393 (Sup. Ct. 1943).

[25] Lederkremer v. Lederkremer, 173 Misc. 587, 18 N.Y.S.2d 725 (Sup. Ct. 1940); Rubman v. Rubman, *supra* note 11.

[26] See generally 18 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE §§ 23-37 (1955); note, *Fraud and Annulment in New York*, 41 COLUM. L. REV. 503 (1941).

[27] 303 N.Y. 506, 104 N.E.2d 877 (1952).

[28] *Id.* at 512, 104 N.E.2d at 880.

[29] *Compare* Cantor v. Cantor, 40 Misc. 2d 642, 234 N.Y.S.2d 600 (Sup. Ct. 1962), *modified*, 18 App. Div. 2d 808, 236 N.Y.S.2d 539 (2d Dep't 1963), *with* Bernardino v. Bernardino, 156 Misc. 203, 280 N.Y. Supp. 13 (Sup. Ct. 1935).

[30] *Compare* Baxter v. Baxter, 11 Misc. 2d 69, 169 N.Y.S.2d 871 (Sup. Ct. 1957), *with* Smith v. Smith, 44 N.Y.S.2d 826 (Sup. Ct. 1943) *and* Jones v. Jones, 189 Misc. 145, 69 N.Y.S.2d 223 (Sup. Ct. 1947).

[31] *Compare* Hameister v. Hameister, 28 Misc. 2d 796, 216 N.Y.S.2d 436 (Sup. Ct. 1961), *with* Natoli v. Natoli 72 N.Y.S.2d 708 (Sup. Ct. 1947).

[32] *Compare* Musso v. Musso, 143 N.Y.S.2d 331

are, moreover, positive indications that the utilization of the "vital" test has wrought little actual change in prior decisional law. For example, in *Matter of Rivette,*[33] a disciplinary proceeding against an attorney for advising the institution of an annulment action upon insufficient ground, the court indicated that a vital element was to be defined as "a material fact concerning which, if defendant had known the truth, he or she would not have entered into the marriage contract."[34]

The instant case reached the Court of Appeals on the question of whether the fraudulent concealment was vital to the marriage.[35] It was alleged that although the defendant was a firm advocate of genocide of the Jewish race, he concealed this during courtship by his seemingly agreeable association with plaintiff's Jewish friends. Plaintiff further contended that she relied on this representation, and had she known his true character as later manifested, she would not have entered into the marriage.[36] Stating the *Shonfeld* "but, for" materiality test, the Court held that a trier of the facts could, if the facts alleged should be proven, conclude that had the true facts been known to plaintiff, she would not have consented to the marriage.[37]

The dissenters voted to affirm upon the basis of the majority opinion of the appellate division.[38] There, it was thought that the husband's past and present beliefs were unrelated to elements vital to the marriage relationship. The dissenting judges apparently agreed that matters of political and philosophical beliefs do not impair the agreement to marry and ought to be compromised by the parties themselves during their union.[39] In addition, the dissenters seemingly concur that the "law could not lay down a viable line of separation between political and philosophical views too extreme to be concealed during the courtship from those not so extreme which may be concealed . . . ."[40]

The majority, on the other hand, saw the beliefs of the defendant as more than mere political views. They were considered fanatical convictions evidencing a diseased mind comparable to lunacy or idiocy, themselves ground for annulment.[41] The defendant's continued adherence to those beliefs, it was thought,

> would so plainly make the marital relationship unworkable in this jurisdiction . . . that it would depart from the realities to conclude that [the concealment] was not *essential* to this married relationship, or that . . . plaintiff would have consented to the marriage without its concealment.[42]

(Sup. Ct. 1955), *with* Glean v. Glean, 70 App. Div. 576, 75 N.Y. Supp. 622 (1st Dep't 1902).

[33] 283 App. Div. 439, 128 N.Y.S.2d 325 (4th Dep't 1954).

[34] *Id.* at 440, 128 N.Y.S.2d at 325-26.

[35] Kober v. Kober, 16 N.Y.2d 191, 192, 211 N.E.2d 817, 818, 264 N.Y.S.2d 364, 365 (1965).

[36] *Id.* at 196-97, 211 N.E.2d at 820, 264 N.Y.S.2d at 369.

[37] *Id.* at 197, 211 N.E.2d at 820, 264 N.Y.S.2d at 368-69.

[38] Kober v. Kober, 22 App. Div. 2d 468, 256 N.Y.S.2d 615 (1st Dep't 1965).

[39] *Id.* at 471, 256 N.Y.S.2d at 618.

[40] *Ibid.* The court conceded however, that under different circumstances, the same misrepresentation might be vital. *Id.* at 472, 256 N.Y.S.2d at 619.

[41] N.Y. DOM. REL. LAW § 140(c).

[42] Kober v. Kober, *supra* note 35, at 197, 211 N.E.2d at 821, 264 N.Y.S.2d at 369. (Emphasis added.)

This being so, it could be found, the Court concluded, "that the facts alleged, if established by evidence, would go to the essence of her consent to marry him."[43]

Basically, the Court applied the rules promulgated in *Woronzoff-Daschkoff*: it required more than a material fraud, *i.e.*, one but for which the plaintiff would not have married the defendant. Holding that the plaintiff stated a cause of action, it concluded that there was a triable issue as to whether the concealment affected a vital aspect of the marriage relationship.[44] The justification for this holding is that the marriage would not be "workable" in this jurisdiction.[45] In so deciding, the Court of Appeals has given the "vital" issue broad definition by injecting the element of subjectivity inherent in such an approach. Thus, the personalities of the parties, as affected by place and circumstance, are factors to be considered. The courts have been adverse to such considerations when dealing with materiality in earlier cases.[46] In the instant case, it was not the mere fact that the defendant was at one time a Nazi officer (which in itself was considered insufficient), but rather, the *continuation* of the defendant's beliefs which caused the disruption in the marriage.[47]

If the *Kober* rationale is strictly applied in the future, the trier of the facts will be able to judge what is "vital" to the marital union by looking at the present status of compatability of the parties as affected by the fraud.[48]

This presents a danger of dilution of the prudent man standard as applied to the determination of the fraud.

There is no doubt that, as the Court has held, the beliefs of the defendant are reprehensible and shocking to the mind and sensibilities of an average person in New York. Such belief, if concealed, could well be considered "vital" to a marriage. However, it is hoped that the grievous nature of the facts alleged in the instant case will be considered in limiting the application of the *Kober* rationale, since the mere factor of incompatability might well open the door to collusive litigants. It is submitted that no test was intended here by the Court, but only a guideline to be considered in cases as they are presented.

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[43] *Id.* at 198, 211 N.E.2d at 821, 264 N.Y.S.2d at 370.

[44] *Id.* at 197, 211 N.E.2d at 821, 264 N.Y.S.2d at 369-70.

[45] *Compare* Douglass v. Douglass, 148 Cal. App. 2d 867, 307 P.2d 674 (1957) (concealment of criminal record and true character). "Either party has a right to a decree of annulment where the fraud is so grievous that it places the injured party in a relationship which is intolerable because it cannot be honorably endured." *Id.* at 870, 307 P.2d at 676.

[46] di Lorenzo v. di Lorenzo, 174 N.Y. 467, 67 N.E. 63 (1903).

[47] *Supra* note 35, at 197, 211 N.E.2d at 821, 264 N.Y.S.2d at 369.

[48] The question is left open, however, as to whether the same result would have been reached if the defendant had reformed subsequent to the marriage.